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No. 04-

IN THE

Supreme Court of the United States

RANDALL WALLACE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Fifth Circuit, affirming the order of the United States District Court for the Western District of Louisiana, which ordered the forfeiture of the airplane belonging to the Petitioner, Randall Wallace, pursuant to 49 U.S.C. § 46306(d)(1), decided an important federal question in a way that conflicts with relevant decisions of this honorable Court: to wit: *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).

2. Whether the Court of Appeals for the Fifth Circuit, affirming the order of the United States District Court for the Western District of Louisiana, which ordered the forfeiture of the airplane belonging to the Petitioner, Randall Wallace, pursuant to 49 U.S.C. § 46306(d)(1), misapplied the law.

3. Whether the Court of Appeals for the Fifth Circuit, affirming the order of the United States District Court for the Western District of Louisiana, which ordered the forfeiture of the airplane belonging to the Petitioner, Randall Wallace, pursuant to 49 U.S.C. § 46306(d)(1), violated a significant issue of public policy and constitutional importance when it affirmed the forfeiture of the Petitioner's airplane, even though he was not one of the principal targets of the forfeiture statute.

4. Whether the Court of Appeals for the Fifth Circuit, affirming the order of the United States District Court for the Western District of Louisiana, which ordered the forfeiture of the airplane belonging to the Petitioner, Randall Wallace, pursuant to 49 U.S.C. § 46306(d)(1), improperly decided the issue of a punitive civil forfeiture without a jury, since the recent decision of this honorable Court in *United States v. Brooks*, __ U.S. __, 2005 WL 50108 (Jan. 12, 2005).

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision and Statutes Involved	1
Introduction	2
Statement of the Case	4
Reasons for Granting the Petition	6
A. Standard Of Review	7
B. Standard Of Law	8
C. The Court Of Appeals Decided The Important Federal Question Of The Proportionality Of A Punitive Civil Forfeiture Under The Excessive Fines Clause Of The Eighth Amendment To The United States Constitution In Conflict With The Decision Of The United States Supreme Court In United States v. Bajakajian	9

Contents

		Page
1.	The Nature Of The Petitioner's Violation	9
2.	The Relationship Of The Petitioner's Violation To Other Illegal Activities Of The Defendant	10
3.	Whether The Violator Clearly Fit Into The Class Of Persons For Whom It Was Principally Designed	11
4.	The Criminal Penalty For The Violation	12
5.	The Harm Involved	15
6.	The Requirements Of Bajakajian Were Not Met	16
D.	Public Policy Militates Against Affirming This Forfeiture	16
E.	The Finding Of The Trial Court, Without A Jury, That The Petitioner's Airplane Was Subject To Forfeiture, Was Invalid And Improperly Affirmed By The Court Of Appeals	18
Conclusion		19

TABLE OF CITED AUTHORITIES

Page

CASES:

United States v. Bajakajian,
524 U.S. 321, 118 S. Ct. 2028,
141 L. Ed. 2d 314 (1998) ..... *passim*

United States v. Brooks,
__ U.S. __, 2005 WL 50108
(Jan. 12, 2005) ..... ii, 3, 5, 18

United States v. Carpenter,
317 F.3d 618 (9th Cir. 2003) 13

UNITED STATES CONSTITUTION:

Sixth Amendment 3, 18, 19

Eighth Amendment ..... *passim*

STATUTES:

49 U.S.C. § 46306(b)(5)(A) 1, 4, 6

49 U.S.C. § 46306(b)(6)(A) 4, 6

49 U.S.C. § 46306(d)(1) ..... i, ii, 1, 2

Cited Authorities

Page

RULES:

U.S. Sup. Ct. R. 10 ..... 2, 16

LEGISLATIVE HISTORY:

134 Cong. Rec. H7074-02 (1988 WL 184933)
(September 7, 1988, pp. 159-70) 11

134 Cong. Rec. H7074-02 (1988 WL 184933)
(September 7, 1988, pp. 495-513) 11

134 Cong. Rec. H7259-02 (1988 WL 175612)
(September 8, 1988, pp. 18-19) 11

134 Cong. Rec. E3272-01 (1988 WL 179589)
(October 6, 1988, pp. 1-2) 11

Federal Aviation Administration Drug Enforcement Assistance Act of 1988, H.R. 100-891, 100th Cong. (2nd Sess. 1988)
(accompanying H.R. 4844) 11

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit 1a

Appendix B — Preliminary Order Of Forfeiture Of The United States District Court For The Western District Of Louisiana Dated July 25, 2003 And Filed July 28, 2003 ..... 11a

OPINIONS BELOW

The opinions of the Court of Appeals filed on October 28, 2004, and the District Court filed on July 28, 2003, are set forth respectively at App. A and B.

STATEMENT OF JURISDICTION

This Honorable Court has general appellate jurisdiction under 28 U.S.C. § 1254 over this matter, as it concerns a decision of the United States Court of Appeals for the Fifth Circuit entered on October 28, 2004, which, rejecting the Petitioner's claim of a violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution concerning the forfeiture of the Petitioner's airplane, affirmed the decision of the United States District Court for the Western District of Louisiana, which ordered the civil forfeiture of the Petitioner's airplane under 49 U.S.C. § 46306(d)(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

49 U.S.C. § 46306(b)(5)(A):

> (b) General criminal penalty. – Except as provided by subsection (c) of this section, a person shall be fined under title 18, imprisoned for not

> more than 3 years, or both if the person — . . . . (5) owns an aircraft eligible for registration under section 444102 of this title and knowingly and willfully operates, attempts to operate, or allows another person to operate the aircraft when — (A) the aircraft is not registered under section 44103 of this title or the certificate of registration is suspended or revoked; . . . .

49 U.S.C. § 46306(d)(1):

> (d) Seizure and forfeiture. — (1) The Administrator of Drug Enforcement or the Commissioner of Customs may seize and forfeit under the customs laws an aircraft whose use is related to a violation of subsection (b) of this section, or to aid or facilitate a violation, regardless of whether a person is charged with the violation. . . .

INTRODUCTION

The Petitioner respectfully suggests that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on this matter should be granted, as the order of the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court. *See* U.S. Sup. Ct. Rule 10(c). Essentially stated, the Court of Appeals, in its published decision concerning this matter, set a new standard for determining whether a civil forfeiture is grossly disproportionate under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution that conflicts with this Honorable Court's decision in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).

The Petitioner also respectfully suggests that his Petitioner for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on this matter should be granted, as this Honorable Court's recent decision in *United States v. Brooks*, __ U.S. __, 2005 WL 50108 (Jan. 12, 2005) has raised issues as to the validity of a civil punitive forfeiture made by a trial court, without a jury, on the basis that as the Eighth Amendment's criminal and/or punitive protections are applicable, then the Sixth Amendment's jury trial requirement should also be applicable. The Petitioner respectfully suggests that this Honorable Court should take cognizance of this matter and clarify this issue.

The Petitioner also respectfully suggests that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on this matter should be granted on the ground that the United States Court of Appeals for the Fifth Circuit misapplied the Court's decision in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) to the facts of this matter.

The Petitioner also respectfully suggests that his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on this matter should be granted, as the decision of the Court of Appeals raises significant issues of public policy and constitutional importance.

STATEMENT OF THE CASE

On or about November 21, 2002, the Petitioner, Randall Wallace, was indicted for registration violations involving his airplane, pursuant to 49 U.S.C. §§ 46306(b)(5)(A) and 46306(b)(6)(A) on a suspicion that the Petitioner was involved in the transportation of illegal drugs. The United States also sought forfeiture of the Petitioner's airplane. No charges of illegal drug activity were ever brought against the Petitioner. No evidence of illegal drug activity was presented against the Petitioner. The evidence showed that the Petitioner had flown his airplane on a single occasion but that he had owned it for a longer period, and that the Petitioner had failed to pay a $5 fee and register his airplane. The Petitioner had no criminal record. The Petitioner pled guilty to one count of violation of 49 U.S.C. § 46306(b)(5)(A) for failure to register his airplane. The Petitioner was sentenced to one (1) year of unsupervised probation and a $100 special assessment. The potential criminal penalty was three (3) years in prison and a $250,000 fine.

A bench trial on the issue of forfeiture of the Petitioner's airplane was subsequently held. The value of the airplane was argued to be between $30,000 and $53,000. The District Court applied a value of $30,000. The United States District Court for the Western District of Louisiana ordered the forfeiture of the Petitioner's airplane.

The Petitioner sought review on the ground that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. The United States Court of Appeals for the Fifth Circuit affirmed the order of the District Court.

The Court of Appeals found that the gravity of the Petitioner's offense, the damage to the integrity of the Federal aviation system, and the fact that Congress intended forfeiture to apply to registration violations all combined to yield the conclusion that the forfeiture was not grossly excessive, as the proportion of the forfeiture ($30,000) was only a fraction of the potential criminal fine ($250,000).

The Petitioner now seeks review on the grounds that: (1) the Court of Appeals decided the important Federal question of proportionality of a punitive forfeiture in a manner that conflicted with previous decisions of this Honorable Court: to wit: *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998); (2) the Petitioner was not a drug trafficker and was not the principal target of the forfeiture statute, as mandated in *Bajakajian*; (3) the District Court improperly ordered a punitive forfeiture, without a jury, in violation of the Sixth amendment and the principles recently announced by this Honorable Court in *United States v. Brooks*, __ U.S. __, 2005 WL 50108 (Jan. 12, 2005); and (4) the order of the Court of Appeals was against public policy and violated constitutional principles.

The Petitioner also raised the issue that the forfeiture ordered by the District Court and affirmed by the Court of Appeals actually required a forfeiture that was three hundred (300) times the actual criminal penalty imposed on the Petitioner, whereas in *Bajakajian*, where a full forfeiture was found to be unconstitutional as violative of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, the forfeiture was only seventy (70) times the highest possible criminal penalty; resulting in the argument that the Petitioner's forfeiture was grossly excessive and the Court of Appeals erred when it affirmed it.

REASONS FOR GRANTING THE PETITION

On or about November 21, 2002, the Petitioner, Randall Wallace, was indicted for registration violations involving his airplane, pursuant to 49 U.S.C. §§ 46306(b)(5)(A) and 46306(b)(6)(A) on a suspicion that the Petitioner was involved in the transportation of illegal drugs. The United States also sought forfeiture of the Petitioner's airplane. No charges of illegal drug activity were ever brought against the Petitioner. No evidence of illegal drug activity was presented against the Petitioner. The evidence showed that the Petitioner had flown his airplane on a single occasion but that he had owned it for a longer period, and that the Petitioner had failed to pay a $5 fee and register his airplane. The Petitioner had no criminal record. The Petitioner pled guilty to one count of violation of 49 U.S.C. § 46306(b)(5)(A) for failure to register his airplane. The Petitioner was sentenced to one (1) year of unsupervised probation and a $100 special assessment. The potential criminal penalty was three (3) years in prison and a $250,000 fine.

A bench trial on the issue of forfeiture of the Petitioner's airplane was subsequently held. The value of the airplane was argued to be between $30,000 and $53,000. The District Court applied a value of $30,000. The United States District Court for the Western District of Louisiana ordered the forfeiture of the Petitioner's airplane.

The Petitioner sought review on the ground that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. The United States Court of Appeals for the Fifth Circuit affirmed the order of the District Court.

The essential findings of the United States Court of Appeals for the Fifth Circuit were as follows:

(1) The gravity of the Petitioner's offense (*i.e.*, owning and operating his unregistered airplane for a period of time) was greater than the gravity of the offense in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) (*i.e.*, one time transportation of money out of the country). Order of the Court Appeals, p. 8.

(2) The Petitioner's failure to register his airplane damaged the integrity of the federal aviation safety and security systems. Order of the Court of Appeals, p. 9.

(3) Congress intended forfeiture to apply for aircraft registration violations not involving drug trafficking. Order of the Court of Appeals, pp. 9-10.

(4) The forfeiture of the Petitioner's airplane was not grossly disproportionate because the maximum statutory criminal fine for an aircraft registration violation applicable to the Petitioner was $250,000, while the maximum penalty for the offender in *Bajakajian* was only $5000 under the U.S. Sentencing Guidelines, which resulted in a forfeiture over seventy (70) times that maximum penalty, whereas the forfeiture for the Petitioner (*i.e.*, $30,000) was a only fraction of the potential criminal fine of $250,000. Order of the Court of Appeals, pp. 7-8, 10.

A. Standard Of Review

Where an appeal of a civil forfeiture is brought on the ground of violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution, the

standard of review is *de novo. See, e.g., United States v. Bajakajian*, 524 U.S. 321, 336-37, 118 S. Ct. 2028, 2037-38, 141 L. Ed. 2d 314 (1998).

B. Standard Of Law

A civil forfeiture is considered punitive if: it is imposed against the respondent personally, not imposed against the property, serves no remedial purpose, is designed to punish an offender, and cannot be imposed upon innocent owners. *United States v. Bajakajian*, 524 U.S. 321, 332, 118 S. Ct. 2028, 2035, 141 L. Ed. 2d 314 (1998). Based on these factors, it is apparent that the forfeiture of the Petitioner's airplane was punitive. The Court of Appeals for the Fifth Circuit did not hold that the forfeiture was not punitive. Thus, this factor is accepted as established for the purposes of this appeal. A punitive forfeiture is unconstitutional if it is disproportionate to the gravity of the offense. *United States v. Bajakajian*, 524 U.S. 321, 336-37, 118 S. Ct. 2028, 2037-38, 141 L. Ed. 2d 314 (1998).

The gravity of an offense is judged by the following factors: (1) the nature of the violation by the defendant; (2) the relationship of the violation to other illegal activities of the defendant; (3) whether the violator fits into the class of persons for whom it was principally designed; (4) the criminal penalty for the violation; and (5) the harm caused. *United States v. Bajakajian*, 524 U.S. 321, 337-40, 118 S. Ct. 2028, 2038-39, 141 L. Ed. 2d 314 (1998).

C. The Court Of Appeals Decided The Important Federal Question Of The Proportionality Of A Punitive Civil Forfeiture Under The Excessive Fines Clause Of The Eighth Amendment To The United States Constitution In Conflict With The Decision Of The United States Supreme Court In *United States v. Bajakajian*

The order of the Court of Appeals for the Fifth Circuit, which affirmed the order of the United States District Court for the Western District of Louisiana, which ordered the forfeiture of the Petitioner's airplane, did not comport with the standards presented by this Honorable Court in the decision of *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). The standards for each of the five (5) factors presented by this Honorable Court in *Bajakajian* for determining the gravity of an offense were not meet. Thus, the Court of Appeals, in its published decision concerning this matter, set a new standard that conflicts with this Honorable Court's decision in *Bajakajian*, The differences between the order of the Court of Appeals and the five (5) factor standard established in *Bajakajian* are presented below.

1. The Nature Of The Petitioner's Violation

The nature of the Petitioner's violation was merely a failure to register his airplane. The Petitioner was not convicted of numerous violations of operating an unregistered airplane. He pled guilty to a single offense of failure to register his airplane. Thus, the nature of the Petitioner's violation was very minor. Indeed, it was an administrative offense, which is almost identical to the offense in *Bajakajian* (*i.e.*, failure to report taking money out of the country). The Petitioner had not engaged in murder, rape, kidnaping,

or the trafficking of drugs. This factor strongly supported the Petitioner's argument that his airplane should not have been subjected to forfeiture. Thus, the finding of the Court of Appeals, that the Petitioner's offense was of greater gravity than the offense in *Bajakajian* and, by implication, was sufficiently grave to justify total forfeiture of the Petitioner's airplane, was not supported by the record, was clearly erroneous, and was in direct violation of this Honorable Court's decision in *Bajakajian* concerning the gravity of an offense.[1]

2. The Relationship Of The Petitioner's Violation To Other Illegal Activities Of The Defendant

This Honorable Court's decision in *United States v. Bajakajian*, 524 U.S. 321, 337-40, 118 S. Ct. 2028, 2038-39, 141 L. Ed. 2d 314 (1998) clearly mandated that the relationship of the respondent's violation to any other illegal activity was a factor to be considered in determining the gravity of an offense. The record in this matter indisputably shows that the Petitioner was not involved in any other illegal activities such as drug trafficking. Thus, this factor unquestionably supported the Petitioner's claim that his violation was not grave and that his airplane should not have been forfeited. Yet, the Court of Appeals essentially failed to address this factor in its order affirming the forfeiture of the Petitioner's airplane. Thus, the order of the Court of Appeals, finding that the forfeiture of the airplane was not

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1. The Petitioner respectfully directs this Honorable Court's attention to the fact that the Petitioner was only fined $100 and only given unsupervised probation, which clearly shows that his offense was not grave or of such gravity as to warrant the forfeiture of nearly the sum total of the Petitioner's worldly goods — his airplane, valued at at least $30,000.

grossly disproportionate, was clearly erroneous in failing to consider this factor in determining the gravity of the offense and failed to adhere to the requirements of this Honorable Court's decision in *Bajakajian.*

3. Whether The Violator Clearly Fit Into The Class Of Persons For Whom It Was Principally Designed

This Honorable Court clearly and specifically stated in the *Bajakajian* decision that a determination of the gravity of an offense depended upon whether the violator fit into the class of persons for whom it was *principally designed. United States v. Bajakajian*, 524 U.S. 321, 338, 118 S. Ct. 2028, 2038, 141 L. Ed. 2d 314 (1998) (emphasis added). The legislative history clearly and unequivocally shows the forfeiture of airplanes was *principally designed* to deter drug trafficking. *See, e.g.*, 134 Cong. Rec. H7074-02 (1988 WL 184933) (September 7, 1988, pp. 159-70) (considering H.R. 100-891); 134 Cong. Rec. H7074-02 (1988 WL 184933) (September 7, 1988, pp. 495-513) (considering H.R. 100-891); 134 Cong. Rec. H7259-02 (1988 WL 175612) (September 8, 1988, pp. 18-19); 134 Cong. Rec. E3272-01 (1988 WL 179589) (October 6, 1988, pp. 1-2); and Federal Aviation Administration Drug Enforcement Assistance Act of 1988, H.R. 100-891, 100th Cong. (2d Sess. 1988) (accompanying H.R. 4844). Further, the record clearly and unequivocally showed that the Petitioner was not a drug trafficker and, thus, did not fit into the class of persons for whom the forfeiture law was *principally designed.* Yet, the Court of Appeals found that Congress also indicated that the forfeiture law could be applied to other violators but the Court of Appeals failed to recognize that the forfeiture law was *principally designed* to deter drug trafficking. Thus, the order

of the Court of Appeals, finding that the fact that Congress found that the forfeiture law could be applied to violators besides drug traffickers was a basis for affirming the forfeiture of the Petitioner's airplane, was not in accordance with this Honorable Court's decision in *Bajakajian.*

4. The Criminal Penalty For The Violation

This Honorable Court indicated in *Bajakajian* that the other criminal penalties for a violation are relevant[2] to determining the gravity of a violation in consideration of the forfeiture's disproportionality. *United States v. Bajakajian*, 524 U.S. 321, 339 n.14, 118 S. Ct. 2028, 2038 n.14, 141 L. Ed. 2d 314 (1998). However, this Honorable Court specifically expressed the principle that any reliance on the other potential criminal penalties in determining the gravity of an offense is undercut when the actual punishment that could be imposed is a fraction of the authorized penalties. *Id.* Indeed, this Honorable Court specifically stated that such a disproportionate difference would be *telling. Id.*

In the instant matter, the Court of Appeals found that the forfeiture of the Petitioner's airplane was not grossly disproportionate because the maximum statutory criminal fine for an aircraft registration violation applicable to the Petitioner was $250,000, while the maximum penalty for the offender in *Bajakajian* was only $5000 under the U.S. Sentencing Guidelines, which resulted in a forfeiture over seventy (70) times that maximum penalty, whereas the forfeiture for the Petitioner (*i.e.*, $30,000) was a fraction of

2. As held in *Bajakajian*, the statute cannot override a constitutional proportionality review. *United States v. Bajakajian*, 524 U.S. 321, 339 n.14, 118 S. Ct. 2028, 2038 n.14, 141 L. Ed. 2d 314 (1998).

the potential criminal fine of $250,000.[3] This finding of the Court of Appeals was not only clearly erroneous, it constituted a proverbial "stacking of the deck".

In fact, the potential maximum criminal fine and penalty for the offender in *Bajakajian* was $250,000 and five (5) years in prison (whereas for the Petitioner in the instant matter the maximum criminal fine and penalty was $250,000 and three (3) years in prison).[4] The Court of Appeals considered the Petitioner's potential maximum penalties under the statute and compared them to the maximum penalties for the offender in *Bajakajian* under the U.S. Sentencing Guidelines but ignored the offender's potential maximum penalties under the statute. The Court of Appeals compared apples and oranges, to the extreme detriment of the Petitioner.

Indeed, taking the very same logic employed by the Court of Appeals in analyzing *Bajakajian* and applying it equally to the Petitioner, a more accurate comparison would have been to compare the maximum criminal penalties actually suffered by the Petitioner, which was $100, to the forfeiture suffered by

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3. The Court of Appeals for the Ninth Circuit has held that it is erroneous to analyze the excessiveness of a forfeiture by comparing it to the value of the property. *See United States v. Carpenter*, 317 F.3d 618, 627 (9th Cir. 2003). Thus, there appears to be conflict between the Fifth Circuit and the Ninth Circuit.

4. Indeed, based on the reasoning in the order of the Court of Appeals concerning the relative criminal penalties applicable to the Petitioner and applicable to the offender in *Bajakajian* concerning the gravity of the offense, it is clearly apparent that the previous finding (Part C 1, *supra*) of the Court of Appeals, that the Petitioner's violation was of greater gravity than the violation of the offender in *Bajakajian*, is simply not supportable under the very standard employed by the Court of Appeals.

the Petitioner, which was $30,000. This would yield a proportionality factor of over three hundred (300) times. As the Court of Appeals indicated that the proportionality factor of seventy (70) times in *Bajakajian* was justification for holding the full forfeiture unconstitutional in *Bajakajian*, it only stands to reason that, using the very same logic employed by the Court of Appeals, a proportionality factor of three hundred (300) times should be more than sufficient to find that the forfeiture of the Petitioner's airplane was disproportionate to the gravity of the Petitioner's violation and violated the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.[5] Indeed, the Petitioner respectfully suggests to this Honorable Court that this clear error is of the same order of magnitude as a finding that an attorney who sleeps through a murder trial can provide effective assistance of counsel.

Succinctly stated, based on the aforementioned argument, the Petitioner respectfully suggests that the Court of Appeals, in its order affirming the forfeiture of the Petitioner's airplane, improperly considered the maximum statutory criminal penalties applicable to the Petitioner when determining the gravity of his offense instead of the actual penalties imposed and, thus, failed to adhere to the requirements of *Bajakajian*.

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5. This Honorable Court specifically recognized in *Bajakajian* that a forfeiture that was many orders of magnitude greater than the actual fine imposed was grossly disproportional. *United States v. Bajakajian*, 524 U.S. 321, 339-40, 118 S. Ct. 2028, 2039, 141 L. Ed. 2d 314 (1998). The Petitioner respectfully suggests that a proportionality factor of three hundred (300) times is more than sufficient to meet this standard for a finding of grossly disproportionality.

5. The Harm Involved

This Honorable Court specifically recognized in *Bajakajian* that for there to be harm to the government, there must be some fraud on the United States or some loss to the public fisc. *United States v. Bajakajian*, 524 U.S. 321, 339, 118 S. Ct. 2028, 2039, 141 L. Ed. 2d 314 (1998). Indeed, under the harm factor, for a forfeiture to be proportional, there must be some articulable correlation to an actual injury suffered by the government. *United States v. Bajakajian*, 524 U.S. 321, 339-40, 118 S. Ct. 2028, 2039, 141 L. Ed. 2d 314 (1998).

In the instant matter, the record did not contain and the Court of Appeals acknowledged no articulable harm to the government nor any loss to the public fisc. Indeed, the Court of Appeals only made the rather nebulous finding that the Petitioner's failure to register his airplane damaged the integrity of the federal aviation safety and security systems in support of its affirmation of the forfeiture of the Petitioner's airplane. In fact, no actual harm was presented by the United States. The fact that there was no actual harm to the government supports the Petitioner's claim that his violation was not grave and that the forfeiture of his airplane was grossly disproportionate in violation of the Excessive Fines Clause of the United States Constitution. Thus, the order of the Court of Appeals, finding that there was harm to the government, was without foundation in the record and was not in accordance with this Honorable Court's decision in *Bajakajian.*

6. The Requirements Of Bajakajian Were Not Met

Based on the arguments presented, *supra*, the Petitioner respectfully suggests that the order of the Court of Appeals decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court. *See* U.S. Sup. Ct. Rule 10(c). The gravity of the Petitioner's offense was minor based on the five (5) factor standard presented in *Bajakajian*, in opposition to the finding of the Court of Appeals. In fact, the low gravity of the Petitioner's violation cries out that forfeiture of property valued at at least $30,000 was disproportionate. Thus, the forfeiture of the Petitioner's airplane was grossly disproportionate. Essentially stated, the Court of Appeals, in its published decision concerning this matter, set and/or applied a new standard for determining whether a civil forfeiture is grossly disproportionate under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution that conflicts with this Honorable Court's decision in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). The Petitioner respectfully suggests that this Honorable Court should grant certiorari to resolve this conflict.

D. Public Policy Militates Against Affirming This Forfeiture

The legislative history of the forfeiture statute indisputably shows that the principal purpose of the forfeiture statute was to inhibit the flow of drugs into the United States. *See supra.* Indeed, this Honorable Court has recognized that civil forfeitures should be applied to the intended targets of the statute (*e.g.*, drug traffickers), as opposed to other citizens who become ensnared in the system. *United States v. Bajakajian*, 524 U.S. 321, 338, 118 S. Ct. 2028, 2038, 141 L. Ed. 2d 314 (1998).

In this matter, to impose upon the Petitioner the forfeiture of his airplane would not advance the drug trafficking prevention purpose of the forfeiture statute. He was never involved in illegal drug activity. Any drug traffickers who do employ airplanes in their smuggling and who take the time to even notice Wallace's case will likely be amused by this forfeiture. These drug traffickers know that such prosecutions only bring additional public opposition to the "War on Drugs" (*i.e.*, see the critically acclaimed film "Traffick", released a few years ago, which highlighted this problem).

In recent times, the civil rights granted to Americans by the Bill of Rights, to include the Eighth Amendment, have come under withering attack by such laws as the Patriot Act. It is undisputed that the Patriot Act has greatly expanded the power of law enforcement and has greatly encroached on the protections of the Bill of Rights. Setting aside the validity of these criticisms for the moment, the responses of the United States and the Department of Justice have included assurances that such intrusive laws are only intended to be directed against and will only be used against the "bad guys" (*i.e.*, the drug traffickers) and will not be used against the average American citizen.

If these assurances are, in fact, sincere, then there is no better case than this one to demonstrate the sincerity of these assurances. The Petitioner is not one of the "bad guys". The Petitioner is the average American citizen. He merely made the mistake of not registering his airplane – he did not engage in the transportation of illegal drugs, which is the focus of the forfeiture statutes. Thus, *Wallace should not suffer the very same forfeiture that a drug trafficker would have suffered.*

To hold otherwise would constitute a complete repudiation of the Doctrine of Proportionality. Such a holding would expand a crack in the protections provided by the Eighth Amendment into a chasm. This is still the United States of America, at least in theory. Public policy militates against affirming this forfeiture. The Petitioner respectfully requests that this Honorable Court grant certiorari to address this issue.

E. The Finding Of The Trial Court, Without A Jury, That The Petitioner's Airplane Was Subject To Forfeiture, Was Invalid And Improperly Affirmed By The Court Of Appeals

It is undisputed that the District Court ordered the forfeiture in this matter without the benefit of a jury.

Recently, this Honorable Court ruled that the Sentencing Guidelines were advisory in nature and subject to the jury trial requirements of the Sixth Amendment. *United States v. Brooks*, __ U.S. __, 2005 WL 50108 (Jan. 12, 2005). Admittedly, the *Brooks* decision was directed to criminal punishments to which the Sixth Amendment would be applicable.

However, as the forfeiture in this matter was indisputably punitive in nature, the Petitioner respectfully suggests to this Honorable Court that the Sixth Amendment's jury requirement would also be applicable to the instant matter. The basis for this argument is that as a punitive civil forfeiture is subject to the requirements of the Eighth Amendment, which is peculiar to criminal and/or punitive punishments, the aspects of the Sixth Amendment that are applicable to criminal and/or punitive matters should also be applicable

to a punitive civil forfeiture. Thus, as the Eighth Amendment is applicable to the instant matter, the Sixth Amendment should also be applicable. Under such applicability, the punitive civil forfeiture of the Petitioner's airplane was invalid, as it was based on findings of facts that were not subject to a jury's consideration.

Accordingly, the Petitioner respectfully prays that this Honorable Court grant certiorari to address and/or clarify this issue.

CONCLUSION

Based on the arguments and authorities presented, *supra*, the Petitioner respectfully prays that this Honorable Court grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JULY 25, 2004 AND FILED OCTOBER 28, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30728

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RANDALL WALLACE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

Before GARWOOD, JOLLY and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

Randall Wallace (Wallace) appeals the forfeiture of his airplane pursuant to his guilty-plea conviction for operation of an unregistered aircraft. We affirm.

Appendix A

Facts and Proceedings Below

On May 28, 2001, Wallace was met by local sheriff's department officers after arriving at the Springhill, Louisiana airport in his Cessna airplane. The local officers intercepted Wallace at the request of United States Customs Service agents, who had been investigating Wallace on suspicion of transporting illegal drugs. Wallace was arrested for possession of a concealed weapon, but was later found not guilty of this charge in state court. While at the airport, Wallace consented to searches of his airplane and truck. No contraband was found in these searches or in later searches by the Customs Service. The Customs Service seized the airplane and took it into custody for this further testing.

Wallace was unable to produce registration papers for the airplane. According to a Customs Service agent's affidavit, Wallace told one of the local officers in Springhill that he had registered the plane in his father's name to conceal its ownership during Wallace's divorce. The most recent Federal Aviation Administration (FAA) registration certificate for the plane was issued to the Arkansas Forestry Commission in 1988. Forestry Commission records indicate that the commission sold the plane to Wallace in 1993.

On November 21, 2002, a three-count Indictment against Wallace was filed in the U.S. District Court for the Western District of Louisiana, Shreveport Division. Count one of the Indictment charged Wallace with owning and knowingly and willfully operating an unregistered aircraft in violation of 49 U.S.C. § 46306(b)(5)(A). Count two charged him with knowingly and willfully operating the unregistered aircraft

in violation of 49 U.S.C. § 46306(b)(6)(A).[1] Each offense was alleged to have been committed "on or about May 28, 2001, in the Western District of Louisiana." Count three sought forfeiture of Wallace's airplane pursuant to 49 U.S.C. § 46306(d)(1), which allows forfeiture of an aircraft "whose use is related to a violation of subsection (b)." 49 U.S.C. § 46306(d)(1). On April 2, 2003, Wallace pleaded guilty to count one pursuant to a plea agreement in which the government agreed to dismiss count two.

A bench trial on the forfeiture count was held on April 9, 2003, at which the district court ordered the parties to brief the issue of whether forfeiture of the airplane would violate the Excessive Fines Clause of the Eighth Amendment under the Supreme Court's holding in *United States v. Bajakajian,* 118 S.Ct. 2028 (1998). The presentence investigation report indicated that Wallace had no criminal history and that there was no applicable or analogous Sentencing Guideline for his offense. On July 10, 2003, the district court sentenced Wallace to one year of unsupervised probation and a special assessment of one hundred dollars for the guilty-plea conviction under count one of the Indictment, and ordered forfeiture of the airplane.

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1. Subsection (b)(5)(A) applies to the owner of the aircraft, whether he operates the aircraft himself, attempts to operate it, or allows someone else to operate it. 49 U.S.C. § 46306(b)(5)(A). Subsection (b)(6)(A) applies to one who operates or attempts to operate the aircraft, whether or not he owns it. 49 U.S.C. § 46306(b)(6)(A). Because Wallace owned the airplane and operated it himself, he was chargeable under both subsections.

Appendix A

Discussion

I. Standard of Review

We review a district court's findings of fact following a bench trial for clear error, and its conclusions of law *de novo*. *Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003). Whether the forfeiture is excessive under the Eighth Amendment is a question of law we review *de novo*. *Bajakajian*, 118 S.Ct. at 2037 & n. 10; *United States v. Brown*, 250 F.3d 907, 913 (5th Cir. 2001).

II. The Supreme Court's Excessiveness Standard From Bajakajian

The defendant in *Bajakajian* attempted to carry more than $350,000 out of the United States without reporting the currency as required by federal law for amounts over $10,000. *Bajakajian*, 118 S.Ct. at 2031; 31 U.S.C. § 5316(a). Federal law also requires a sentencing court to order forfeiture of any property involved in a violation of the reporting requirement. *Bajakajian*, 118 S.Ct. at 2032; 18 U.S.C. § 982(a)(1). The maximum fine under the Sentencing Guidelines for the defendant's reporting offense was $5000. *Bajakajian*, 118 S.Ct. at 2032. The Supreme Court held that forfeiture of the entire $357,144 involved would violate the Excessive Fines Clause. *Id.* at 2029-30.

More generally, the Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 2036. In arriving at the "grossly disproportional" standard, the

Court found two considerations "particularly relevant": 1) "that judgments about the appropriate punishment for an offense belong in the first instance to the legislature," and 2) "that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.* at 2037. The Court noted that "[b]oth of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense." *Id.*

With respect to the defendant's currency reporting violation, the Court stated that the crime was "solely a reporting offense," and that because the defendant was not found to have been involved in other illegal activities such as drug trafficking, money laundering, or tax evasion, he did not "fit into the class of persons for whom the statute was principally designed." *Id.* at 2038. The Court noted that the maximum fine of $5000 under the Sentencing Guidelines, while the statutory maximum fine was $250,000, "confirm[ed] a minimal level of culpability." *Id.* & n. 14. Furthermore, the Court stated that the harm caused by the defendant's violation was minimal, asserting that only the government was affected, "and in a relatively minor way," by the failure to report the currency. *Id.* at 2039.

After *Bajakajian,* the Eleventh Circuit has attempted to "translat[e] the gravity of a crime into monetary terms." *United States v. 817 N.E. 29th Drive,* 175 F.3d 1304, 1309 (11th Cir. 1999). Noting the Supreme Court's consideration in *Bajakajian* giving deference to judgments of the legislature on punishment, the Eleventh Circuit stated that "if the value of the forfeited property is within the range of fines prescribed

by Congress, a strong presumption arises that the forfeiture is constitutional." *Id.* The court went on to say that "if the value of the property forfeited is within or near the permissible range of fines under the sentencing guidelines, the forfeiture almost certainly is not excessive." *Id.* at 1310. The district court referred to these Eleventh Circuit statements at the bench trial on forfeiture of Wallace's airplane.

III. Proportionality of Wallace's Airplane Forfeiture

In contrast to the situation in *Bajakajian,* as the district court determined – and Wallace does not contest – there is no applicable or analogous Sentencing Guideline for Wallace's unlawful operation of an unregistered airplane. Therefore the only current legislative guidance as to the gravity of Wallace's offense in monetary terms is the statutory maximum fine of $250,000.[2] Forfeiture of the $30,000 airplane is certainly not grossly disproportionate as compared to this $250,000 statutory maximum.

It may seem that comparison of Wallace's airplane value to the $250,000 statutory maximum is harsh in this case, since the $250,000 maximum fine is a default provision for any felony rather than a fine specifically provided by the statute defining Wallace's offense. *See* note 2, *supra.* Until 1994,

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2. 49 U.S.C. § 46306(b) states that a violator "shall be fined under title 18, imprisoned for not more than 3 years, or both." 49 U.S.C. § 46306(b). 18 U.S.C. § 3571 sets a maximum fine of $250,000 for any felony, unless a specific statute prescribes otherwise (by specific reference to § 3571). 18 U.S.C. § 3571(b)(3) & (e). The aircraft registration violation of 49 U.S.C. § 46306(b) is a Class E felony under 18 U.S.C. § 3559 because a prison term of up to three years is specified. 18 U.S.C. § 3559(a).

the maximum fine under the predecessor to 49 U.S.C. § 46306(b) was $15,000. 49 U.S.C. app. § 1472(b)(2)(A) (repealed 1994). The 1994 amendment changed the maximum fine language to read "fined under title 18" for the stated purpose of "consistency with title 18." 49 U.S.C. § 46306 Historical and Statutory notes (citing H.R. Rep. 103-180 (1993)). There is no indication in the legislative history of the 1994 amendment that a substantial increase in the resulting fines was intended. It may be, for example, that Congress referenced the default fine provision in order to make the statute compatible with future treatment under the Sentencing Guidelines.[3]

Even if the original $15,000 statutory maximum fine under the predecessor statute is used for guidance, however, forfeiture of Wallace's airplane is not grossly disproportionate. The $30,000 value of the airplane differs from this maximum by only a factor of two.[4] In *Bajakajian,* by contrast,

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3. The Sentencing Commission initially made clear that it could not "comprehensively treat all regulatory violations in the initial set of guidelines," but planned to "address the less common regulatory offenses in the future." U.S. Sentencing Guidelines Manual ch. 1, pt. A. sec. 4(f) (1987), *reprinted in* U.S. Sentencing Guidelines Manual § 1A1.1 editorial note (2003). The statement that less common offenses would be addressed in the future was removed in a 1990 amendment, however. *See* U.S. Sentencing Guidelines Manual § 1A1.1 editorial note (2003).

4. Wallace contended before sentencing that the airplane was worth $53,000, and provided supporting documentation to the probation officer. Wallace's appellate brief uses the $30,000 figure, however. Even if the airplane is valued at $53,000, our conclusion that the forfeiture is not prohibited by the Excessive Fines Clause remains the same.

the $357,000 forfeiture sought by the government was over seventy times the maximum fine of $5000 under the Sentencing Guidelines. Finding the forfeiture of Wallace's airplane to be excessive would require imposing the kind of strict proportionality that the Supreme Court expressly disavowed in *Bajakajian*. *Bajakajian,* 118 S.Ct. at 2037.

Not only is the value of the forfeiture in the instant case smaller than that at issue in *Bajakajian,* but we believe the gravity of the offense is greater. The offense in *Bajakajian* was a one-time transportation of currency out of the United States without declaring it. In the instant case, by contrast, Wallace owned the airplane for some seven years without registering it before it was seized by the government. He argues in his brief that "[t]he function of the airplane was a source of transportation and joy to Wallace," that "[t]he function that it [the airplane] performed was that it was Wallace's means of transportation and it was his sole tangible property of any value that provided him his joy in life. Flying is Wallace's life," and that "[a]ll he has done with it is fly around the State of Arkansas and to Florida with it for a vacation.[5] Wallace has been flying safely for years." Obviously, he was operating an unregistered airplane on an ongoing basis, as opposed to the one-time violation in *Bajakajian*. Wallace does not argue that his failure to register the airplane was any sort of mere spur of the moment lapse in judgment or misplaced desire to avoid some bureaucratic

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5. Indeed, the evidence shows Wallace flew the plane from Louisiana to Florida on May 26, 2001, and from Florida to Louisiana on May 28, 2001.

delay on a single occasion (much less that there was any true inadvertence). In fact, Wallace testified that he had owned four other airplanes and had registered all of them. Furthermore, the fact that the most recent registration certificate on file for the airplane was with the Arkansas Forestry Commission increased the damage to the integrity of federal aviation safety and security systems caused by Wallace's operation of an unregistered plane. As noted in a federal agent's affidavit submitted by the government, airplanes registered to natural resource agencies are able to engage in low-level flight, below radar coverage, without attracting a law enforcement response, since such agencies are known to conduct low-level flights for research and survey purposes.

Wallace argues that he is similar to the defendant in *Bajakajian* in that he is not the type of offender (namely, a drug trafficker) at whom the aircraft registration statute is targeted. It is true that the 1988 introduction of criminal penalties and the forfeiture provision appears to have been motivated by drug enforcement concerns. *See* 134 Cong. Rec. 22,632 (1988). However, Congress clearly intended that forfeiture apply for violations not involving drug trafficking, as well. The forfeiture provision was described in House debate as "giv[ing] law enforcement agencies the authority to seize aircraft when there are violations of the new criminal provisions whether controlled substances are involved or not." *Id.* That drug traffickers are not the only target of the statute Wallace was charged under is further evidenced by the existence of a separate subsection of the statute providing a longer maximum prison term when controlled substances are involved. 49 U.S.C. § 46306(c)(2).

Wallace further invokes other factors that courts have gleaned from *Bajakajian,* such as related illegal activities and the benefit reaped by the claimant contesting the forfeiture. See *United States v. Lot Numbered One of Lavaland Annex,* 256 F.3d 949, 958 (10th Cir.2001); *United States v. 3814 NW Thurman Street,* 164 F.3d 1191, 1197-98 (9th Cir.1999). Even to the extent that some of these factors may suggest a relatively low gravity for Wallace's offense, this does not make forfeiture of his airplane excessive. A lower offense gravity would suggest comparison of the forfeiture value to a fine level lower than the statutory maximum, as was done in *Bajakajian* by considering the Sentencing Guidelines' maximum fine. *Bajakajian,* 118 S.Ct. at 2038-39. But even when we compare Wallace's forfeiture to a reduced fine level such as the $15,000 maximum fine for the predecessor statute, the amount of the forfeiture is simply not grossly disproportional.

Conclusion

The forfeiture of Wallace's airplane is not grossly disproportional to the gravity of his offense. Therefore, the forfeiture is not in violation of the Excessive Fines Clause, and the district court's judgment is accordingly

AFFIRMED.

APPENDIX B — PRELIMINARY ORDER OF FORFEITURE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA DATED JULY 25, 2003 AND FILED JULY 28, 2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

Criminal No.: 02-50106-01

UNITED STATES OF AMERICA

VERSUS

RANDALL WALLACE

MAGISTRATE JUDGE PAYNE

JUDGE STAGG

PRELIMINARY ORDER OF FORFEITURE

WHEREAS, by virtue of the terms and conditions of the defendant's plea agreement, the United States is now entitled to possession of all of the defendant's rights, title and interest in the 1963 Cessna 21 Oc (tail number N3705Y, serial number 21058205) aircraft.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

Appendix B

1. Based on the District Court's order, all rights, title and interest of the defendant RANDALL WALLACE in the 1963 Cessna 210c (tail number N3705Y, serial number 21058205) aircraft is hereby forfeited to the United States for disposition in accordance with the law, subject to the provisions of Title 21, United States Code, Section 853(n)(1).

2. The United States Marshals Service shall seize said aircraft on behalf of the United States.

3. That pursuant to Title 21, United States Code, Section 853(n)(1), the United States Marshals Service shall publish at least once for three successive weeks in a newspaper or newspapers of general circulation for Springhill, Louisiana and Stamps, Arkansas notice of this order, notice of the United States' intent to dispose of the property in such a manner as the Attorney General may direct, and notice that any person other than the defendant, who claims any rights, title or interest in the property listed above, must file a petition with the Clerk of the United States District Court, for the Western District of Louisiana, 300 Fannin Street, Shreveport, Louisiana 71101, within thirty (30) days of the final publication of notice or of receipt of actual notice, whichever is earlier.

The notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in the forfeited property, and any additional facts surrounding the petitioner's claim and relief sought.

Appendix B

The United States may also, to the extent practicable, provide direct written notice to any person known to have an alleged interest in the property that is the subject of this Preliminary Order of Forfeiture, as a substitute for published notice as to those persons so notified.

4. That upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture in which all interests will be addressed.

DONE AND ORDERED this 25th day of July 2003, in Shreveport, Louisiana.

s/ Tom Stagg
TOM STAGG
United States District Judge